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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-18

JOHN R. ENGLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

COOK, MURPHY, LANCE & MAYER
D. JEFF. LANCE
ROBERT J. KOSTER
611 Olive Street
St. Louis, Missouri 63101

DON O. RUSSELL
418 Olive Street
St. Louis, Missouri 63102
Attorneys for Petitioners

Of Counsel
ARENT, FOX, KINTNER, PLOTKIN & KAHN
JOHN M. BRAY
1815 H Street, N. W.
Washington, D. C. 20006

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The Government's Concession That the Indictment Was Ambiguous Requires That the Petition for Writ of Certiorari Be Granted.

The Government in its Brief in Opposition for the first time, admits an ambiguity in the indictment. It concedes that the term "Total Income" is subject to at least two

meanings but, without any supporting authority, it concludes that the meaning to be attached to the term is the "ordinary meaning", the same as "total receipts" or "gross income". (Govt's Brief p. 6)

To extricate itself from the predicament thus created by the admitted ambiguity in the indictment, the Government says there is nothing to indicate that Petitioner was misled by the ambiguity, and, that in any event, if Petitioner had any doubts about the use of the term "Total Income" he should have sought clarification by way of a Bill of Particulars.

It is petitioner's position that the circumstances clearly indicate that he was misled by the use of the term "Total Income". In his own defense to the Government's evidence at trial, petitioner offered numerous witnesses which consumed one full day of trial time, corroborated by a stipulation which showed, without contradiction, that the gross amount received from American Vending was spent on business-connected entertainment and goodwill promotion. This evidence was offered for two reasons: to show lack of the requisite intent and to establish the fact that under no circumstances was the gross amount received from American Vending reportable in "Total Income" as used on Line 9, page 1. Therefore, the Government's position cannot be sustained on the mere unfounded statement that the petitioner was not misled, when the only circumstances bearing upon the subject indicate the contrary to be the case.

As to petitioner's failure to file for a Bill of Particulars, it is submitted that he should not be held to have waived any right to challenge the indictment upon appeal because he did not so move. In **Standard Oil Co. of Texas v. U.S.**, 307 F.2d 120 (C.A. 5th, 1962), the Court said:

> "While it is true that indictments are to be construed in a common sense way where one is subject equally to one of two interpretations, one of which states an offense and the other which does not, the indictment is insufficient since there is no assurance that the Grand Jury would have returned the indictment had the words been employed in a sense necessary to sustain the conviction."

Under the instant indictment, while one of the meanings of total income (gross receipts), as urged by the Government, would be sufficient to sustain the conviction, the other meaning (gross receipts less allowable deductions and expenses) as contended by Petitioner, would not.

Further, there is no rule which requires an accused to seek a clarification of an ambiguous indictment by means of a Bill of Particulars. To the contrary, in such a situation, when the indictment itself gives no independent aid to the construction of an ambiguous term, justice requires an interpretation most favorable to the defendant, so long as it is a reasonable interpretation. As was stated in **Smith v. U.S.**, 360 U.S. 1, 9 (1959):

> "The traditional canon of construction . . . calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved."

Petitioner attached a reasonable interpretation on the indictment. The Government's position, that he was required to seek clarification, when in fact, at the preliminary stages of the proceedings, it was not apparent that clarification was needed, imposes a burden on an accused inconsistent with the principles of criminal justice.

CONCLUSION

Petitioner submits that the Government's concession as to the ambiguity in the key term of the indictment requires a full review of the issues presented by the Petition and, therefore, the Writ of Certiorari should issue.

Respectfully submitted

COOK, MURPHY, LANCE
& MAYER

D. JEFF LANCE

ROBERT J. KOSTER
611 Olive Street
St. Louis, Missouri 63101

DON O. RUSSELL
418 Olive Street
St. Louis, Missouri 63102
Attorneys for Petitioner

Of Counsel:

ARENT, FOX, KINTNER,
PLOTKIN & KAHN

JOHN M. BRAY
1815 H Street N.W.
Washington, D.C. 20006